IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 807 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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KESHAJI VARVAJI THAKORE & 4 - Appellant(s)

Versus

THE STATE OF GUJARAT - Opponent

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Appearance :
MR HL PATEL for Petitioners
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR for Respondent
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 12/08/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 374 (2) of the

Code of Criminal Procedure, 1973, is directed against judgment dated April 21, 2005, rendered by learned Additional Sessions Judge, 3rd Fast Track Court, Mehsana, in Sessions Case No. 227 of 2003 by which all the five appellants, who are original accused Nos. 2 to 6, are convicted under Section 135 of the Bombay Police Act, whereas appellant No. 2 is convicted under Section 326 IPC and appellant Nos. 1, 3 and 5 are convicted under Section 324 IPC, whereas appellant No. 4 is convicted under Section 323 IPC and all are sentenced to imprisonment till rising of the Court for commission of offence punishable under Section 135 of the Bombay Police Act, whereas appellant No.2 is sentenced to RI for 4 years and fine of Rs. 2000/-, in default SI for 4 months for commission of offence punishable under Section 326 IPC and appellant Nos. 1, 3 and 5 are sentenced to RI for 3 years and fine of Rs. 1,500/-, in default SI for 2 months for commission of offence punishable under Section 324 IPC, whereas appellant No. 4 is sentenced to RI for 1 year and fine of Rs. 1,000/-, in default SI for 1 month for commission of offence punishable under Section 323 IPC.

2. The facts emerging from the record of the case are

as under:

The incident in question took place on April 22, 2003. At about 5.30 P.M. on the day of incident, younger brother of complainant, named Arjanji was mending boundary wall of the field. At that time, Govindji Keshaji picked up a quarrel with him. This incident was narrated by Arjanji Somaji to his brother Patel Naranbhai Ambalal, who is complainant in this case. It is the case of the prosecution that at about 9.30 P.M. when the complainant and others were coming towards village, they were accosted by the accused. According to the prosecution, the accused were abusing the complainant and others, which was objected to by the complainant and others and thereupon, appellant No. 2 inflicted a dharia-blow on right hand of the complainant and as the complainant received bleeding injury, he raised shouts for help, as a result of which, members of Thakore Community, residing in the Mohalla, came to the place of incident. On seeing members of Thakore Community, the accused got annoyed. The prosecution claims that appellant No. 1 inflicted injury by sword on shoulder of Gandaji Joitaji and also caused injury by dharia on right shoulder of Jayantiji as well as on hand of Manuji

Gandaji whereas appellant No. 4 inflicted stick blow on Sakaraji Kalaji and Manuji Gandaji. It is the case of the prosecution that Popatji Somaji i.e. the appellant No. 5 inflicted danti blow on Sakaraji Kalaji whereas others threw stones at the complainant and others. As others intervened in the incident, the accused fled the place of incident.

The injured went to Community Health Centre, Kadi, for treatment on their own. Police Sub-Inspector, Mr.M.J. Desai, recorded complaint of Patel Naranbhai Ambalal at Community Health Centre. The complaint was handed-over to PSO of Kadi Police Station for registration of offences. After registration of offences, the PSO of Police Station handed-over the complaint for further investigation to Mr. Desai. Mr. Desai recorded statements of those persons who were found to be conversant with the facts of the case. He arrested the accused and pursuant to disclosure statements made by them, weapons used in the incident in question were discovered. On completion of investigation, the appellants were charge-sheeted in the Court of learned Judicial Magistrate (First Class), Kadi, on the basis of which Criminal Case No. 1958 of 2003 was registered. It

may be stated that in the incident in question, the appellants and others were also injured. With reference to injuries sustained by the appellants and others, a complaint was lodged by Baldevji Pujaji Thakore. That was also investigated by PSI Mr. Desai. On completion of investigation, the accused in that case, were charge-sheeted in the Court of learned Judicial Magistrate (First Class), Kadi, for commission of offence punishable under Section 307 IPC as well as other offences. As offence punishable under Section 307 is exclusively triable by the Court of Sessions, the said case was committed to Sessions Court and registered as Sessions Case No. 226 of 2003. As instant case was a cross-case of Sessions Case No. 226 of 2003, this case was also committed to the Sessions Court for trial, where it was numbered as Sessions Case No. 227 of 2003.

3. The learned Judge, to whom the case was made over for trial, framed necessary charge against the appellants and others, at Exh. 15. It was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Dr. Parul Chandrakant Sheth as PW 1, at Exh. 32; (2) Dr. Gopalbhai Sombhai Makwana as PW 2, at Exh. 43; (3) Dr.

Mukstakahmed Gulamrasul Shaikh as PW 3, at Exh. 45; (4) complainant, Kalaji Somaji Thakore as PW 4, at Exh. 49; (5) injured, Manuji Gandaji as PW 5, at Exh. 51; (6) injured, Jayantiji Ghabhaji Thakore as PW 6, at Exh. 52; (7) injured, Sakaraji Kalaji Thakore as PW 7, at Exh. 53; (8) injured, Thakore Gandaji Joitaji as PW 8, at Exh. 54; (9) eye-witness Chhanaji Jethaji Thakore as PW 9, at Exh. 56; (10) injured, Manuji Prahladji Thakore as PW 10, at Exh. 57; (11) *panch*, Mangaji Pujaji Thakore as PW 11, at Exh. 63; (12) *panch*, Raghuji Viraji Thakore as PW 12, at Exh. 65; and (13) Investigating Officer, PSI Mr. M. J. Desai as PW 13, at Exh. 66, to prove its case against the accused. The prosecution also produced documentary evidence, such as, certificates of injuries sustained by injured witnesses; the complaint lodged by Kalaji Somaji Thakore at Exh. 50; *panchnama* of place of incident, etc. in support of its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the accused, the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statement, as required by Section 313 of the Code of Criminal Procedure, 1973. In further statement, each

accused claimed that he was innocent. However, no defence evidence was led by any of the accused.

5. On appreciation of evidence adduced by the prosecution, the learned Judge of the trial Court held that it was not proved by the prosecution that an unlawful assembly was formed to cause injury to complainant and others and, therefore, commission of offences punishable under Sections 147, 148 read with Section 149 IPC was not established. The learned Judge held that it was established that appellant No. 2 inflicted dharia-blow on head as well as right-hand of complainant Kalaji Somaji and, therefore, was liable to be convicted under Section 326 IPC. According to the learned Judge, it was proved that appellant No. 1 caused injury by means of sword to witness Gandaji on his left upper arm and was, therefore, liable to be convicted under Section 324 IPC. The learned Judge noticed that it was not proved by the prosecution that original accused No. 1 i.e. Govindji caused injury by means of dharia on witness Jayantiji and he was not liable to be convicted under Section 324 IPC. The learned Judge deduced that it was proved that appellant No. 3 inflicted dharia-blow on the head of Manilal @ Manaji and was liable to be

convicted under Section 324 IPC whereas appellant No. 5 inflicted dhanti-blow on hand of witness Manaji and was, therefore, liable to be convicted under Section 324 IPC. The learned Judge further held that it was proved by the prosecution that appellant No. 4 caused injury by inflicting stick-blow on back of witness Manaji and therefore, was liable to be convicted under Section 323 IPC. The learned Judge also held that injuries sustained by injured witnesses indicated that all the accused had armed themselves with different weapons and, therefore, commission of offence under Section 135 of the Bombay Police Act was established. In view of abovereferredto conclusions, the learned Judge has convicted all the accused under Section 135 of the Bombay Police Act, 1951 and the five appellants under Sections 326, 324 and 323 IPC, as mentioned above and imposed punishments referred to earlier *vide* judgment dated April 21, 2005, giving rise to instant appeal.

6. Mr. Vijay H. Patel, learned Counsel of the appellants, pointed out that the evidence on record indicates that there was free fight and / or mutual fight between the appellants and prosecution witnesses, as a result of which, the learned Judge of the Trial Court was

justified in not invoking the provisions of Section 149 IPC to the facts of the case. It was argued that appellants Nos. 1, 2 and 5 as well as original accused Nos. 1, 7 and one Motiben, who is not prosecuted in this case, sustained bleeding injuries, which are not explained by any of the prosecution witnesses, and as genesis of the incident in question is suppressed by the prosecution, the appellants are entitled to acquittal. The learned Counsel emphasised that perusal of testimony given by each injured witness makes it evident that he is not supported by medical evidence regarding his own injuries and, therefore, the judgment impugned deserves to be set aside. It was argued that non-explanation of injuries sustained by the appellants should prompt the Court to draw the inferences, as stated by the Supreme Court in **Lakshmi Singh and Others Vs. State of Bihar, AIR 1976 SC 2263,** and that the appellants should be acquitted, more particularly when it probabalises the case of each appellant that he is falsely involved in the case. What was maintained by the learned Counsel of the appellants was that the evidence on record has been completely misread by the learned Judge of the trial court and, therefore, the appeal should be allowed.

7. Mr. K. T. Dave, learned Additional Public Prosecutor for the State, argued that injured witnesses would not allow the real culprits to go scot-free and involve innocent persons falsely, as a result of which, well-founded conviction of the appellants based on the testimony of injured witnesses should be upheld by this Court. The learned Additional Public Prosecutor pointed out to the Court that non-explanation of injuries on the facts and in the circumstances of the case cannot be regarded as having vitiating effect on the prosecution-case and, therefore, the plea based on non-explanation of injuries should not be accepted by the Court. It was argued by the learned Additional Public Prosecutor that to some extent, the injured witnesses stand corroborated by medical evidence on record, and, therefore, no benefit of doubt should be given to any of the appellants, as is sought to be claimed by the learned Counsel of the appellants. The learned Additional Public Prosecutor for the State asserted that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court, who had advantage of observing demeanour of the witnesses, for convicting the appellants and as the learned Counsel of the appellants has failed to dislodge those weighty reasons, the appeal, which lacks merits,

should be dismissed.

8. This Court has heard Mr. Vijay H. Patel, learned Counsel of the appellants as well as Mr. K.T. Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. On going through the paper-book supplied by the learned Counsel of the appellants for perusal of the Court, this Court finds that Section 149 IPC is not invoked by the learned Judge of the trial Court and, therefore, it will be necessary for the Court to consider the question whether each appellant has committed offence / offences as enumerated by the learned Judge of the trial Court in the impugned judgment.

9. The testimony of complainant Kalaji Thakore, recorded at Exh. 49, would indicate that he was prosecuted for commission of offence punishable under Section 307 IPC. He has admitted in his cross-examination that accused Keshaji, accused Govindji, accused Raghaji, accused Baldevji and one Motiben

Ambarambhai as well Fatehsinh Somaji had received injuries in the incident. It was suggested to the witness that to his knowledge, injured accused Govindji and accused Keshaji were removed to Civil Hospital for better treatment but the witness has pleaded ignorance. However, there is no manner of doubt that this witness has refrained from offering explanation as to how the accused and others had received injuries. Again, the testimony of witness Manuji Gandaji, recorded at Exh. 51, would show that he along with others and the accused were removed to Community Health Centre by police in the same vehicle. Though this witness has stated that he was not knowing that injuries were sustained by accused Govindji Keshaji, accused Keshaji Vervaji, accused Ratisinh @ Raghaji Somaji, accused Ranchodji @ Kantiji Somaji, accused Udaji Somaji, accused Fatesinh @ Pratapji @ Popatji Somaji, accused Baldevji @ Daluji Pujaji, accused Gopalji Keshaji and Motiben Ambarambhai, the witness had to admit that it was true that accused were removed to Community Health Centre for treatment in the same vehicle in which he and others were removed. Therefore, there is no manner of doubt that he has avoided giving explanation as to how the accused and others had sustained injuries in the incident. Further, this

witness has in terms admitted that a case was pending against him and others for assaulting the accused. The testimony of witness Thakore Jayantiji Ghabhaji, recorded at Exh. 52, would show that those who were injured, including injured accused were in chawk when police had arrived. What is relevant to notice is that this witness has admitted that they had assaulted the accused and in order to defend themselves, the accused had resisted, as a result of which, the complainant in this case and others had received injuries. Again, the testimony of witness Thakore Sakaraji Kalaji recorded at Exh. 53 shows that he had learnt at Community Health Centre, Kadi, that in the incident in question, accused Govindji, Motiben Ambarambhai, accused Raghaji Somaji, accused Udaji Somaji, accused Baldevji, etc. had received injuries. Thus, a fair and reasonable reading of the evidence on record makes it very evident that the accused had received injuries in the case. Those injuries were serious because the complainant and the witnesses were prosecuted for commission of offences punishable under Section 307 IPC with other serious offences. Therefore, in the circumstances, they were expected to offer explanation regarding injuries sustained by the accused. However, as noticed earlier, the complainant and his

witnesses have refrained from offering explanation regarding injuries sustained by the accused.

In **Lakshmi Singh and Ors. Vs. State of Bihar, AIR 1976 SC 2263**, the Supreme Court has considered the effect of non-explanation of injury sustained by the accused and inferences which can be drawn by the Court of law. The Supreme Court has laid down that non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance, from which the Court can draw the following inferences:

(i) that the prosecution has suppressed the genesis and origin of the occurrence and has, thus, not presented the true version;

(ii) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable, and,

(iii) that in case there is defence version which explains the injuries on the person of the accused, it is rendered probable so as to throw doubt on the prosecution-case.

Again, in **Rukma (Smt) and Others Vs. Jala and**

Others, (1997) 11 SCC 579, injuries were received by six accused. The injuries received by two of the accused were not minor. There was denial by injured witnesses to have caused any injury to any of the accused. They had flatly denied that they had weapons with them at the time of the incident. The Supreme Court in the circumstances of the case, has held that the High Court was justified in not placing reliance on such witnesses and possibility of innocent persons being roped in was not ruled out.

Applying the principles laid down by Supreme Court in the above quoted two decisions to the facts of the present case, this Court finds that non-explanation of the injuries sustained by the accused, at about the time of occurrence should prompt the Court to draw inferences that the prosecution has suppressed the genesis and origin of occurrence and has not presented true version and that the witnesses who have denied the presence of injuries on the person of the accused are lying on a most material point and therefore, their evidence is not reliable. It is relevant to notice that omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence, as in this case, consists of interested or inimical witnesses. The prosecution is,

therefore, liable to fail on this short point alone.

10. However, this Court does not propose to disbelieve the prosecution-case only on this ground and proposes to examine the testimony of injured witnesses in detail so as to ascertain whether offence / offences, as alleged by the accused, were committed.

The testimony of witness Kalaji Somaji, recorded at Exh. 49, would show that according to him Ratisinh @ Raghaji, who is appellant No. 2, had inflicted dharia-blow on him. However, the medical evidence tendered by Dr. Parul Sheth makes it evident that this witness had sustained one incise wound on head and another Contused Lacerated Wound (CLW) on finger of right hand. The witness could not explain or state before the Court as to how he had received CLW on finger of right hand. Under the circumstances, this Court is of the opinion that witness Kalaji Somaji does not stand fully corroborated by medical evidence on record. Further in his complaint, the case of the witness was that Ragaji was armed with a sword whereas in his substantive evidence before the Court, he has said that Raghaji was armed with a dharia. The change of weapon attributed to accused Raghaji is not explained by the complainant at all. Moreover, he has

admitted that he with his brothers had gone to entrance of Mohalla to scold Govindji Keshaji Thakore and that when they reached the corner of Mohalla, Govindji Keshaji and his brothers had gone to offer food to their deity. Thus, there is no manner of doubt that this witness and his brothers had initially gone to scold Govindji Keshaji, which resulted into the incident. What is relevant to notice is that he has in terms admitted that at the time of incident, there was complete darkness. According to him, the darkness was so intense that he was not able to identify as to who was sitting in the trailer of the tractor, in which they were removed to Community Health Centre, Kadi, for treatment. It was suggested to him that in his complaint it was stated by him that Keshaji i.e. appellant No. 1 assaulted him with sword but that suggestion was denied by him. However, the witness stands contradicted with reference to his own complaint wherein, he has in terms stated that appellant No. 1 was armed with sword. The witness has further stated that first of all, Gandaji was assaulted after which, he was assaulted and thereafter he had become unconscious and had regained conscious only at Community Health Centre, Kadi. If this is true, he could not have witnessed as to which accused had assaulted the other witness. Therefore, there is no manner of doubt the witness has tendency to

exaggerate. What is relevant to notice is that this witness has claimed in his testimony before the Court that PSI Mr. Desai had approached him after two days of incident. However, the record clinchingly establishes that his complaint was recorded by PSI Mr. Desai on the very day of incident itself at Community Health Centre, Kadi. It is shocking to notice that this witness has further admitted in his evidence that after they were removed to Community Health Centre, Kadi, for treatment, he had collected full particulars of the incident after regaining consciousness. Therefore, there is no manner of doubt that he had lodged complaint after due deliberations. On the facts and in the circumstances of the case, this Court is of the opinion that the learned Judge of the trial Court was not justified in placing reliance on the testimony of this witness for the purpose of fastening criminal liability on any of the appellant and that his testimony should have been discarded from consideration.

Coming to the testimony of witness Manuji Gandaji Thakore, recorded at Exh. 51, this Court finds that he has stated that accused No.4 i.e. Ranchodji Kantiji assaulted him with dharia whereas accused No. 6 Fatesinh @ Pratapji @ Popatji Somaji assaulted him with danti and

accused No. 5 Udaji Somaji assaulted with stick whereas accused No. 7 i.e. Baldevji @ Daluji and accused No. 8 Gopalji Keshaji, threw stones at him. However, the medical evidence tendered by Dr. Parul Sheth makes it evident that this witness had sustained only one external injury and that too on one of his fingers. Thus, this witness has also tendency to exaggerate and make improvements to suit his purpose. In his cross-examination, the witness has in terms admitted that he had narrated before the Doctor that he had received injury on his back. The testimony of Dr. Sheth would further show that she had attempted to know history of injury from this witness, but the witness could not give name of any of the assailants at all. On the facts and in the circumstances of the case, this Court is of the opinion that the witness is thoroughly unreliable and cannot be believed for supporting the case of the prosecution.

Injured Manaji Prahladji, whose testimony is recorded at Exh. 57, has stated that he was assaulted by Ramanji Gandaji, who is not arraigned as one of the accused in the case. According to him, Ramanji Gandaji injured him with stick on head. Though the Doctor found one CLW on head of this witness, it is relevant to notice

that Ramanji Gandaji is not prosecuted. Therefore, none of the appellants can be held liable for causing injury to witness Manaji Prahladji. The witness has further mentioned that a great hubbub had taken place at the time of incident and, therefore, it was not possible to observe / see as to who had sustained injury by throwing stones. It is also admitted by the witness that when he was removed to Community Health Centre, Kadi, for treatment, the Doctor had asked him to narrate the history, but it is an admitted position that the witness had not given name of any of the accused as his assailant. On the facts and in the circumstances of the case, this Court is of the opinion that the testimony of this witness is also of no help to the prosecution and could not have been relied upon by the learned Judge of the Trial Court for convicting the appellants.

The testimony of witness Jayantiji Ghabhaji, recorded at Exh. 52, would show that according to him, accused Keshaji Vervaji i.e. appellant No. 1 had caused injury to him by means of a sword. However, the medical evidence shows that he had sustained only CLW on left hand. Thus, this witness does not get corroboration from medical evidence on record regarding his own injury. Further, this witness has in terms admitted in his cross-

examination that he had not sustained any injury by means of a dharia. It is relevant to notice that it was stated by this witness in his Police Statement that Keshaji Vervaji i.e. appellant No. 1 had inflicted sword-blow on him. This stands proved by the testimony of Investigating Officer, Mr. Desai. According to witness Jayantiji, he had reached the place of incident after injuries were already sustained by all, meaning thereby accused also. It is mentioned by the witness that they had assaulted the accused and the accused had acted in self-defence, as a result of which, they had received injuries. In view of the damaging statements made by this witness in his cross-examination, this Court is of the opinion that he is thoroughly unreliable and his testimony cannot be acted upon for the purpose of coming to the conclusions that the appellants are guilty of the offences with which they were charged.

So also testimony of witness Sakaraji Kalaji recorded at Exh. 53 shows that according to him, accused No. 5 i.e. Udaji Somaji had given one blow with stick. The medical evidence on record shows that he had received two CLWs, which is not explained by him at all. Again, in his cross-examination, the witness has stated that he had gone to chowk after scuffle between all was over and

that he had received injury while returning home. As observed earlier, the witness could not give any explanation regarding injuries sustained by the accused. On the facts and in the circumstances of the case, this Court is of the opinion that the learned Judge of the trial Court was not justified in placing reliance on the testimony of this witness for the purpose of coming to the conclusion that charge levelled against the appellants was proved.

Witness Gandaji Jyotaji, in his testimony recorded at Exh. 54, has stated that he was assaulted by accused Keshaji Vervaji with sword. It is proved that an incise wound on his left shoulder was found by Dr. Sheth, who had treated him at Community Health Centre, Kadi. However, this witness has in terms stated that at the time of incident, cataract was developing and he was not able to see the things clearly. It is also mentioned by the witness that he was not able to see in darkness. Complainant Kalaji Somaji in his testimony has in terms stated that at the time of incident, there was complete darkness. Therefore, the claim of this witness that he was assaulted by original accused, Keshaji Vervaji by means of sword becomes highly doubtful His testimony, therefore, cannot be relied upon for the purpose of

believing prosecution-case.

Further, this Court finds from the testimony of Investigating Officer, Mr. M. J. Desai, recorded at Exh. 66, that an information was received by him from PSO of Kadi Police Station that mutual fight had taken place between members of Thakore Community. The witness has further stated that he had recorded the complaint of the complainant at Community Health Centre, when all were being treated. He has also mentioned that it transpired in his investigation that members of both the groups had received injuries in a free fight by means of sticks and dharias. Thus, on re-examination and reassessment of evidence of injured witnesses, this Court finds that it is not prudent to place reliance on the testimony of witnesses for the purpose of coming to the conclusion that they had committed offences, as alleged by the prosecution.

The net result of above discussion is that the prosecution-case is liable to be disbelieved and the appeal deserves to be accepted.

11. For the foregoing reasons, the appeal succeeds. Judgment dated April 21, 2005 rendered by the learned

Additional Sessions Judge, 3rd Fast Track Court, Mehsana in Sessions Case No. 227 of 2003, convicting all the accused, including the appellants under Section 135 of the Bombay Police Act as well as appellant No. 2 under Section 326 IPC and appellant Nos. 1, 3 and 5 under Section 324 IPC as well as appellant No. 4 under Section 323 IPC and imposing different punishments enumerated therein, is hereby set aside. Instead, the appellants are acquitted. The conviction under Section 135 of the Bombay Police Act of those accused who have not preferred appeal is also set aside. The respondent is directed to forthwith release the appellants from jail, unless presence of all or any of them in jail is needed with reference to any other case. Fine, if paid, be refunded to the appellants. The *muddamal* be disposed of in terms of the directions issued by the learned Judge of the trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath